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10 **UNITED STATES DISTRICT COURT**
NORTHERN DISTRICT OF CALIFORNIA - SAN FRANCISCO DIVISION

11 DAVID M. CURLEY, SR.,

12 Plaintiff,

13 v.
14

15 WELLS FARGO & COMPANY, a
corporation; WELLS FARGO BANK, N.A.,
a subsidiary of Wells Fargo & Company,
16 Inc., WELLS FARGO HOME MORTGAGE,
a division of WELLS FARGO BANK, N.A.,
17 THE FEDERAL HOME LOAN MORTGAGE
CORPORATION, AND DOES 1-10,
18

Defendants.
19 _____/

No. CV 13-03805-NC

PLAINTIFF'S EVIDENTIARY
OBJECTIONS FOR MOTION FOR
SUMMARY JUDGMENT

Date: July 22, 2015

Time: 1:00 p.m.

Courtroom: D, 15th Floor

Judge: Hon. Nathanael M. Cousins

Notice of Removal August 16, 2013

Trial Date: August 31, 2015

20 1. Declaration of Alisha R. Mulder in Support of Motion for Summary Judgment.

21 As to each paragraph and each of the exhibits: Objected to on lack of foundation
22 and lack of authentication Fed. Rule of Evidence 902(11), 803(6).

23 **Business Records Foundation:**

24 This is apparently an attempt to assert a foundation under the business records
25 rule. Under Rule 902(11) the declarant must be the custodian of the records or other
26 "qualified person". This declarant is unknown, we don't know who she is, who she works
27

1 for or what her job is. We don't know whether she has knowledge of when the materials
2 were made, how she knows they were kept in the regular course of business or as a
3 regular practice. The Custodian or other "qualified" witness has to show "...sufficient
4 knowledge of the record keeping system..... [and] the creation and maintenance of the of
5 the records" *Rambus, Inc. v. Infineon Technologies AG* 348 F. Supp 698 (E. D. Va. 2004)
6 Counsel can give lip service only to the four requirements for admissibility but that cannot
7 give Wells Fargo the right to a judgment. See *United States v. Atlas Lederer Co.*, 282
8 F.Supp.2d 687, 696. (S.D. Ohio 2001) In *Rambus*, the court threw out almost all the
9 declarations submitted for not meeting the standards. She becomes neither the Custodian
10 nor a qualified person by these conclusory self-serving statements. This witness was
11 switched from Weatherly who Mr. Canatella had to go to Iowa to depose.

12 Authentication:

13 A trial court can only consider admissible evidence in ruling on a motion for
14 summary judgment. See Fed. R. Civ. P. 56(e); *Beyene v. Coleman Sec. Servs., Inc.*, 854
15 F.2d 1179, 1181 (9th Cir. 1988). Authentication is a "condition precedent to admissibility,"
16 and this condition is satisfied only by "evidence sufficient to support a finding that the
17 matter in question is what its proponent claims." *Fed. R. Evid. 901(a)*. Unauthenticated
18 documents cannot be considered in a motion for summary judgment. See *Cristobal v.*
19 *Siegel*, 26 F.3d 1488, 1494 (9th Cir. 1994); *Hal Roach Studios, Inc. v. Richard Feiner &*
20 *Co., Inc.*, 896 F.2d 1542, 1550-51 (9th Cir. 1989); *Beyene*, 854 F.2d at 1182; *Canada v.*
21 *Blain's Helicopters, Inc.*, 831 F.2d 920, 925 (9th Cir. 1987); *Hamilton v. Keystone Tankship*
22 *Corp.*, 539 F.2d 684, 686 (9th Cir. 1976).

23 In a summary judgment motion, documents authenticated through personal knowledge must be
24 "attached to an affidavit that meets the requirements of [Fed. R. Civ. P.] 56(e) and the affiant must
25 be a person through whom the exhibits could be admitted into evidence." *Canada*, 831 F.2d at 925
26 (citation omitted). *Orr v. Bank of Am.*, NT & SA, 285 F.3d 764, 773-74 (9th Cir. 2002) (footnotes
27

omitted); see *Las Vegas Sands, LLC v. Nehme*, 632 F.3d 526, 532-33 (9th Cir. 2011) (following Orr).

A document can be authenticated [under Rule 901(b)(1)] by a witness who wrote it, signed it, used it, or saw others do so." *Orr*, 285 F.3d at 774 n.8 (quoting 31 Wright & Gold, Federal Practice & Procedure: Evidence § 7106, 43 (2000)). Even though Ms. Moore attempts to authenticate the exhibits under *Federal Rule of Evidence 901(b)(1)* based on her personal knowledge, it does not appear that any of the exhibits are ones that she wrote, signed, used, or saw others write, or sign. (See and the cases cited therein.) They are not authenticated and cannot be used over objection. For example, she did not write or receive any of the documents attached as exhibits. They are not authenticated and cannot be used over objection. Wells Fargo required Mr. Canatella to go to Iowa to take the deposition of Ms. Weatherly a disclosed witness. It was revealed that she did not qualify to authenticate nor to be a custodian or other qualified witness.

Rule 26(a) Objection.

Mr. Canatella had to go to Iowa to depose Ms. Weatherly and when it was revealed that she does not qualify, they switched her. We now have Ms. Mulder in apparently the same position. She discusses the facts of the case. It reads at times like an expert declaration and at other times like a declaration of a percipient witness. Under either designation she does not qualify.

This objection goes to the Mulder Declaration Exhibits A, B, C, and D.

2. Declaration of Yvonne Wheeler in Support of Motion for Summary Judgment.

As to each paragraph and each of the exhibits: Objected to on lack of foundation and lack of authentication Fed. Rule of Evidence 902(11), 803(6).

She says she is the Custodian of Records for CWR Corporation. However, she speaks as a percipient witness with information that goes beyond the documents. The foundation as required under the authorities quoted above is not there.

Exhibit A looks like a Notice of Default from the County Recorder's office. She is

1 not the Custodian of County records. It would have taken very little effort to get a
2 certified copy from the County Recorder but this was not done.

3 Absent a certified copy it is not authenticated.

4 Exhibits B and C are each a series of documents that are not relevant; the
5 mechanics of the sale are not at issue.

6 Exhibits D and E. are not relevant.

7
8
9 3. OBJECTIONS TO THE REQUEST FOR JUDICIAL NOTICE.

10 The are listed in the declaration of Evelynna Manukian asking for judicial notice.

11 Defendants request the Court take judicial notice of various documents, including
12 pleadings and other documents filed in a related state court action entitled *Curley v. Wells*
13 *Fargo Bank etcl.*, San Mateo County Superior Court, CIV 497844. The request must be
14 denied because the San Mateo County action was voluntarily dismissed without prejudice
15 and dismissed by the court without prejudice on July 11, 2013. See Declaration of
16 Richard Canatella, Exhibit A. When the action was dismissed it is as if it never existed.
17 See *Bonneville Assoc. Ltd. P'ship v. Barram*, 165 F.3d 1360, 1364 (Fed. Cir. 1999) ("The
18 rule in the federal courts is that '[t]he effect of a voluntary dismissal without prejudice
19 pursuant to Fed. R. Civ. P. 41(a)(1) 'is to render the proceedings a nullity and leave the
20 parties as if the action had never been brought.' " (citations omitted)); *Frazer v. United*
21 *States*, 49 Fed. Cl. 734, 736 (2001) (where the earlier case no longer pending, later
22 time-barred action "stands alone" and does not relate back to earlier suit). Defendants
23 concede this is the effect of plaintiff's voluntary state court dismissal without prejudice.
24 Dkt No. 93 at 28:10-17.

25 Rule 41(a)(1) provides plaintiffs "an absolute right to dismiss without prejudice."
26 *Janssen v. Harris*, 321 F.3d 998, 1000 (10th Cir. 2003). To be effective "no action is
27 required on the part of the court"; rather, it is the filing of the notice itself that closes the

1 file. Id. The Tenth Circuit concludes:

2 ... *There is nothing the defendant can do to fan the ashes of that action into life*
3 *and the court has no role to play....* There is not even a perfunctory order of court
4 closing the file. Its alpha and omega was the doing of the plaintiff alone. The effect
5 of the filing of a notice of dismissal pursuant to Rule 41 (a)(1)[(A)](i) is to leave the
6 parties as though no action had been brought. Once the notice of dismissal has
7 been filed, the district court loses jurisdiction over the dismissed claims and may
8 not address the merits of such claims or issue further orders pertaining to them.

9 Id. (quoting *Duke Energy Trading & Mktg., LLC v. Davis*, 267 F.3d 1042, 1049 (9th
10 Cir. 2001) (emphasis added); accord *Netwig v. Ga.-Pac. Corp.*, 375 F.3d 1009, 1011
11 (10th Cir. 2004). Therefore, where defendants concede that plaintiff filed a request for
12 dismissal of the San Mateo County action then that action is terminated without prejudice
13 here pursuant to *Janssen*, 321 F.3d at 1000. California state law is the same; the
14 dismissed action is a nullity.

15 Since the San Mateo County proceedings are in legal effect a nullity this Court
16 cannot judicially notice those proceedings. *The court may not judicially notice the truth of*
17 *the disputed facts contained in such a document. Lee*, 250 F.3d at 689. Because the
18 foregoing exhibits are offered to establish disputed facts (i.e., whether plaintiff or counsel
19 ever received any of the exhibit documents; and there is no authentication of the exhibits
20 by someone with personal knowledge who can testify under oath that the documents
21 were made available to plaintiff or counsel and when they were made available. The
22 documents also contain material alterations without explanation. Finally, the documents
23 are inadmissible;

24 A court may judicially notice a fact that is not subject to reasonable dispute
25 because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be
26 accurately and readily determined from sources whose accuracy cannot reasonably be
27 questioned. Fed.R.Evid. 201(b). A court may take judicial notice of court filings and other
28 matters of public record. See *Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741,
29 746 n. 6 (9th Cir. 2006). *But the Court may not take judicial notice of the veracity of any*
30 *arguments or facts presented in the documents subject to judicial notice. See Wyatt v.*

1 *Terhune*, 315 F.3d 1108, 1114 n. 5 (9th Cir. 2003) (factual findings in one case ordinarily
2 are not admissible for their truth in another case through judicial notice); *Lee v. City of*
3 *Los Angeles*, 250 F.3d 668, 690 (9th Cir. 2001) (a court may take judicial notice of
4 another court's opinion, but not of the truth of the facts recited therein); *M/V American*
5 *See Queen v. San Diego Marine Constr. Corp.*, 708 F.2d 1483, 1491 (9th Cir. 1983), a
6 court may take judicial notice of court records, but it may not take judicial notice of the
7 truth of the contents of documents found therein).

8 Counsel does not seem to distinguish the difference between judicial notice (of
9 facts) and a Custodian's foundation for business records. Also, the foundation and
10 authentication required for official records is not provided. Counsel can assert that
11 various documents exist in the Recorder's office but that is not a certification declaration
12 from the Recorder.

13 Exhibits A, B, C, D and E, which are multiple documents in several cases, cannot
14 be judicially noticed for their contents.

15 DATED: June 26, 2015

/s/David R. Olick
DAVID R. OLICK
Attorney for Plaintiff